

NTSB Order No. EA-4038

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 29th day of November, 1993

Docket SE-11375

Respondent has appealed from the oral initial decision of Administrative Law Judge Jimmy Coffman, issued on January 27, 1992, following an evidentiary hearing.¹ The law judge affirmed an order of the Administrator suspending respondent's commercial pilot certificate for 120 days, for violating 14 C.F.R. 91.79(c)

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and 91.9.² We deny the appeal. Initially, we address respondent's procedural challenges to the law judge's decision.

Respondent claims that he was denied his right to counsel at the hearing, and that it was error for the law judge to deny counsel's request for a continuance. We disagree.

The order of suspension was issued in this case in September 1990, and a hearing was scheduled for May 1991.³ Respondent then requested that the hearing be postponed until mid-October 1991, as he would be out of the country from mid-March through September. The law judge granted that request.

In mid-November 1991, and on more than 60-days notice, the hearing was rescheduled for January 27, 1992, more than 15 months after the order of suspension was issued. On Thursday, January

²§ 91.79(c) (now 91.119(c)), Minimum safe altitudes; General, read:

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

Respondent was charged with operating an aircraft over open water at altitudes and distances closer than 500 feet from persons or vessels.

§ 91.9 (now 91.13(a)) provided:

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

³According to the Administrator, an informal conference was held on March 27, 1990. See Response to Petition for Rehearing at 1.

23rd, one working day before the Monday scheduled hearing, counsel for respondent filed a Motion for Continuance seeking an undefined extension of time.⁴ Grounds for the delay were respondent's prior absence from the country and the alleged resulting inability to retain counsel or prepare for trial. The motion stated that counsel had only been employed the day before and that counsel had not had the opportunity to prepare or conduct discovery. The motion was denied by the law judge.

On the morning of the hearing, the law judge received a message that respondent's counsel could not appear due to a divorce case that had been calendared for trial that same day. Attached to respondent's appeal is an affidavit from the judge in that matter, confirming counsel's attendance. This conflict was not mentioned in the motion, nor had the law judge otherwise been made aware of it. The law judge again denied the request, noting the Administrator's opposition, based as it was on the fact that his witnesses had traveled considerable distances to attend the hearing that day.

Contrary to respondent's claim, he has no right to counsel in the Board's civil, administrative proceedings.⁵ Nor do we find that the law judge abused his discretion in denying the

⁴The motion was not served on the Administrator. Respondent's counsel also failed to file an appearance.

⁵See, e.g., Administrator v. Olsen & Nelson, NTSB Order EA-3949 (1993). The law judge explained to respondent how he might participate, and respondent testified, questioned his supporting witness, and cross-examined one of the Administrator's witnesses (having been given the opportunity to question all three).

request for a continuance. As the Administrator notes, counsel was not unfamiliar with the case (see note 3, supra), nor would respondent's own delay in obtaining counsel justify a continuance. Respondent, whether in or out of the country, had more than a year to prepare his defense and obtain counsel.

Counsel's failure to be forthright does not aid respondent's case. Respondent's motion did not mention the conflicting trial dates, although it seems counsel was aware of them at the time he agreed to represent respondent at the January hearing and at the time he filed the motion. See Affidavit of Donald E. Heck, Addenda to Appeal.⁶ We agree with the Administrator that the facts here are considerably different from other cases where we have remanded for further hearing so that counsel may be present. See, e.g., Administrator v. Fries & Long, NTSB Order EA-3517 (1992) (continuance should have been granted where law judge was given substantial notice of counsel's prior commitment on hearing date and postponement would work no inconvenience on the Administrator).⁷

Turning to the merits, respondent argues that the law judge erred in finding a violation of § 91.79(c). The law judge found that respondent operated the aircraft over the water closer than

⁶The Administrator suggests (Reply at 10) that the divorce case was scheduled far into the docket, and counsel "simply gambled that no conflict would arise" because the judge would not get to the case that day.

⁷See also Administrator v. Knox, 1 NTSB 2062 (1972) (failure to provide satisfactory explanation for absence at hearing demonstrates that appeal has not been prosecuted with diligence and good faith and dismissal is appropriate).

500 feet and that, during the flight, the airplane hit a power line causing the plane to break up and crash into the water.⁸

The law judge relied on the testimony of three eyewitnesses to the accident, all of whom testified to respondent's flight well below 500 feet and one of whom, Mr. Delp (who had a restricted commercial pilot certificate and was familiar with the Cessna 172, Tr. at 16, 19), testified to hearing the engine running normally.⁹

Respondent, however, contends that an emergency in the form of partial engine failure justified the low flight (and caused the accident).¹⁰ Respondent, in his appeal, attempts to discredit the testimony of the Administrator's witnesses.

The standard for reversal on these grounds is a difficult one to meet, however. Administrator v. Smith, 5 NTSB 1560, 1563 (1987), and cases cited there (resolution of credibility issues, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge). Respondent's challenges are not convincing. The fact that Mr. Delp (perhaps the most important witness) may not have been exact in his estimates of

⁸Respondent exited the aircraft safely. His passenger was apparently knocked unconscious and was rescued by boaters. These boaters were witnesses at the hearing. See discussion, infra.

⁹Another witness testified that he heard the engine running up until the crash. Tr. at 14.

¹⁰Although respondent separately challenges the § 91.9 finding, that finding is residual to the operational violation, and does not affect the sanction analysis. See Administrator v. Buller, NTSB Order EA-2661 (1988); and Administrator v. Haney, NTSB Order EA-3832 (1993).

altitude at particular locations is insufficient ground for rejecting his testimony, which otherwise is thoroughly consistent with the testimony of the Administrator's other two witnesses and not internally inconsistent in any material or important way.¹¹

The question before the law judge was whether to believe the Administrator's eyewitnesses, who testified that respondent flew over the lake at an altitude of less than 500 feet, apparently with no engine difficulty, or to accept respondent's uncorroborated assertion that the crash was caused by engine trouble. Nothing in respondent's appeal persuades us, under the standard discussed above, that the law judge's resolution of this conflict in testimony in favor of the Administrator's witnesses should be disturbed.¹²

¹¹Even respondent's witness, the passenger in the aircraft, did not provide testimony in direct support of respondent's version of events prior to the crash.

¹²The law judge's credibility choice had the effect of rejecting respondent's affirmative defense that an emergency (*i.e.*, engine problems) justified his low flying, as there was no other evidence to support that claim.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The 120-day suspension of respondent's commercial pilot certificate shall begin 30 days from the date of service of this order.¹³

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

¹³For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).